

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4076

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

v.

WESTERN ELECTRIC, INC.,
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

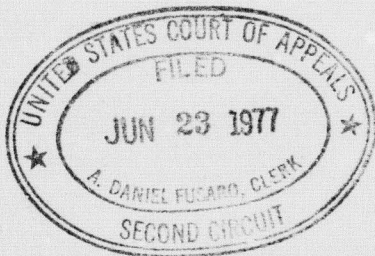
BRIEF FOR THE SECRETARY OF LABOR

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BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF QUESTION PRESENTED

In response to fast-breaking reports of abnormally high rates of liver cancer deaths among vinyl chloride workers exposed to vinyl chloride gas, as well as new evidence establishing this substance as a carcinogenic agent, the Secretary in early April 1974 issued an emergency temporary standard requiring essential employer steps to identify operations exposing workers to excessive VC levels and to limit their exposure to this lethal substance. First among the standard's hazardous-operation-identification provisions was its "initial monitoring" requirement,

which pertinently mandated that:

As soon as possible but not later than April 22, 1974, every employer of an employee working in an area of operation in which vinyl chloride is...released... shall begin monitoring the ambient air of [every such] area to determine whether it contains vinyl chloride gas in [excess] concentrations... [emphasis supplied].

In June 1974 the Secretary cited Western Electric for admittedly failing initially to monitor an operation in which vinyl chloride was released. The question presented is:

Whether the Review Commission erroneously concluded Western Electric satisfied this initial monitoring requirement merely by monitoring one operation it thought likely to be the most hazardous, despite the standard's clear contrary command.

STATEMENT OF THE CASE

1. Nature of the case

This case is before the Court pursuant to section 11(b) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.) on the Secretary's petition to review an adverse decision of the Occupational Safety and Health Review Commission issued January 24, 1977. The Commission's decision is unofficially reported at 1976-77 CCH OSHD Para. 21,538 and is reproduced in the joint appendix (A. 172-184). This Court has jurisdiction, since Western Electric's principal office is in Manhattan. 29 U.S.C. 660(b).

2. Regulatory background

Vinyl chloride (VC) is a chlorinated hydrocarbon which exists in a gaseous state at room temperature and pressure and is a basic ingredient of commercial plastics production (A. 15, 19).^{1/} Most VC gas upon being synthesized is immediately subjected to a reactive process that polymerizes VC molecules, producing the raw plastic resin polyvinyl chloride (PVC) but leaving some VC gas, molecules trapped within the resin (id.).^{2/} Manufacturers of, e.g., pipes, containers, and electrical insulation apply heat to raw PVC to cause mass melting of the resin and render it amenable to such fabrication techniques as extrusion and injection molding (A. 15, 22). However, mass melting also permits residual VC gas freely to escape from the resin (A. 22). Society of Plastics Ind. v. OSHA, 509 F.2d 1301 (C.A. 2, 1975), cert. den. 421 U.S. 992 (hereafter "SPI").

In early 1974 OSHA received the first in a stream of company reports on employee deaths from angiosarcoma, an irreversible and otherwise rare form of liver cancer which suddenly

^{1/} "A" references are to the parties' appendix. References preceding a semi-colon are to the decisions below; those following to the supporting evidence. References to A. 15-17 are to the Secretary's preamble and emergency vinyl chloride standard, 39 Fed. Reg. 12342-44 (April 5, 1974); references to A. 18-27 to his preamble and permanent standard, 39 Fed. Reg. 35890-98 (Oct. 4, 1974). See 29 U.S.C. 655(c), 655(b)(1)-(4). "Leg. Hist." references are to Committee Print, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92d Cong. 1st Sess. (1971).

^{2/} Polymerization is a "chemical reaction in which two or more small molecules combine to form larger molecules that contain repeating structural units of the original molecules..." Webster's Third New Int'l. Dict. (1961).

appeared related to VC exposure (A. 15). These fatalities occurred not only in VC and PVC production environments but those where workers' sole exposures were during fabrication (A. 15, 19, 21). SPI, supra, 509 F.2d at 1306. Based on this information and recent laboratory studies, the Secretary concluded vinyl chloride was a human carcinogen which presented "a grave danger" to exposed employees warranting immediate regulation under his statutory emergency powers (A. 15). 29 U.S.C. 655(c).^{3/} On April 2, 1974 he accordingly issued his vinyl chloride ETS drastically reducing permissible employee exposures from 500 to 50 parts per million (ppm). 29 CFR 1910.93q, 39 Fed. Reg. 12342-44 (April 5, 1974). This standard expressly applied (1910.93q(a)) "to any area or operation in which [VC]...is manufactured, reacted, handled, processed, released, repacked, or stored," exempted only (.93q(a)(2)) "the handling, storage, or other use of [PVC] in the form of [previously] fabricated products," and as a threshold matter mandated (.93q(c)(1)):

Initial Monitoring. As soon as possible but not later than April 22, 1974, every employer of an employee working in an area of operation in which vinyl chloride is manufactured, reacted, handled, processed, released, repacked or stored shall begin monitoring the ambient air of the area to determine whether it contains vinyl chloride in concentrations [at any time] in excess of 50 ppm [emphasis supplied].

^{3/} OSHA section 6(c)(1), 29 U.S.C. 655(c)(1), authorizes the Secretary to promulgate without rulemaking an immediately effective temporary standard (ETS) if he determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger."

While this provision initially required weekly monitoring of each such area and operation until all results were below 50 ppm for three consecutive weeks, only monthly testing was mandated thereafter. 1910.93q(c)(2), .93q(c)(3).^{4/} In his preamble the Secretary explained the initial sweep of these monitoring provisions necessarily was broad (A. 15):

Because exposure to VC is hazardous, and because such exposure can occur in the processes of synthesizing or polymerizing of VC or in the handling of VC polymers or copolymers which contain absorbed VC, this standard applies to all such processes and to the handling, reacting, manufacturing, processing, releasing, repackaging, or storage of any of these materials. The monitoring requirements serve two purposes, to trigger into operation a compliance program [if necessary] and to check the effectiveness of the program [emphasis supplied].

He additionally pointed out that a "no exposure exceeding 50 ppm" standard was deliberately selected over a competing eight-hour time-weighted-average recommendation because the evidence "revealed that several kinds of...operations are of short duration" and the latter proposal "would permit exposure to VC at concentrations of 400 ppm for one hour" (id.).^{5/}

^{4/} Where monitoring revealed concentrations exceeding 50 ppm, respirator use was immediately required until the employer could implement suitable engineering and work practice controls. 29 CFR 1910.93q(d).

^{5/} A "time-weighted average" (TWA) essentially provides that exposures averaged over an 8-hour workday shall not exceed a stated limit, but provides little protection where very high exposures of relatively short duration may be brought below the TWA by several hours' non-exposure.

Immediately after promulgating the ETS the Secretary commenced full rulemaking and in October 1974 issued his permanent VC regulation. 29 CFR 1910.1017; 39 Fed. Reg. 35890-98 (Oct. 4, 1974).^{6/} This standard reiterated its precursor's application to all areas and operations covered by the ETS. It too exempted "the handling or use of fabricated products made" of PVC; and it specifically defined a "fabricated product" as one "made of wholly or partly from [PVC]... which does not require further processing at temperatures, and for times, sufficient to cause mass melting of the [resin] resulting in the release of vinyl chloride." 29 CFR 1910.1017 (a)(2), (a)(6). The preamble to this standard specifically rejected several companies' recommendation that fabricators be completely exempted or less stringent requirements for them established, restating in greater detail the reasons for including them under the ETS (A. 19-22):

The record evidence establishes that at least some employees [in this industry] are exposed in excess of the permissible control limits [record cites omitted]. In these circumstances we believe that it is imprudent to grant a blanket exemption for all fabricators. Therefore, the final standard

^{6/} OSHA sections 6(c)(2) and (c)(3), 29 U.S.C. 655(c)(2) and (c)(3), direct the Secretary to conduct an informal hearing and promulgate his final standard within six months of the ETS' publication. See 29 U.S.C. 655(b). The Secretary's final standard was originally promulgated as 29 CFR 1910.93q--- the same reference as the superceded ETS---but has since been redesignated 29 CFR 1910.1017 and will be referred to by the latter citation to avoid confusion here.

is applicable to the fabrication industry, as well as the monomer and polymer industries. Employers who in fact, are substantially below the exposure limit will be subjected to only minimal burdens [consisting essentially of required initial monitoring to establish that fact]....Where employers in the fabricating industry have exposures approaching the permissible limit, they will appropriately be subject to the standard. Employers handling or using fabricated products made of PVC were not included in the ETS or the proposal and are excluded from the final standard. This conclusion is based on the absence of adequate evidence of exposure to VC in these operations. The final standard clarifies the exemption by defining a fabricated product [as stated supra] [emphasis supplied].

Although affected industries had not challenged the ETS, they immediately sought judicial review of the final standard, 29 U.S.C. 655(f), inter alia contending the Secretary's decision to impose initial monitoring and other requirements on the fabricating industry was unsupportable. SPI, supra. In rejecting their contention this Court noted (id. at 1310):

...of course [the fabricating industry was] included because of their work with PVC resin which in final form contains residual amounts of VCM, and the record shows that two deaths have in fact occurred among fabricators. ...[Any future decision to exclude these companies from initial monitoring and consequent requirements] would be for the Secretary...on appropriate application or on his own motion [but] as the record presently stands, their inclusion is amply justified [emphasis supplied].

3. Pertinent facts

The relevant facts are undisputed. Western Electric is a billion-dollar corporation which is headquartered in Manhattan and operates nationwide facilities, including a Missouri electronics plant where PVC is used in several

different manufacturing processes (A. 7, 11, 100-101). ^{7/} In one encapsulation process performed monthly to insulate electrical coils, about 50 coils are clipped to a rack, heated to 360°F, and immediately dipped in a 2-gallon tank labelled "polyvinyl chloride" which contains Hysol---a liquid plasticizer more than half composed of "dispersed" (finely ground) PVC held in suspension. The coils remain immersed in the Hysol for a few minutes while the suspended PVC heats to its fusion temperature. Heating both permits the PVC to go into solution with the plasticizer's other components, and allows trapped VC gas readily to escape into the atmosphere. Once the plasticizer forms a bond to the coils, they are removed from the tank, reheated in the oven, then cooled (A. 173-174, 157-160; 41, 43, 47, 71-73, 81, 107-109, 125-126).

In early May 1974 Western Electric industrial hygienist Widner surveyed the literature on VC exposure and solely on that basis concluded neither the coil-encapsulation nor any other process at the Missouri plant presented a VC exposure hazard to employees (A. 113-115). Although admittedly familiar with the Secretary's vinyl chloride ETS and its preamble explaining the broad applicability and mandatory nature of the

^{7/} Dun & Bradstreet "Million Dollar Directory" (1977), 2414.

initial monitoring provisions for all workplaces using PVC resin, Widner believed it was for him "to decide how fast" VC was being released, "how hazardous the operation is... how likely to cause any adverse effects on the [employees'] health [and]...what steps should be taken" (A. 112-113, 123-124). He acknowledged that Hysol contains suspended PVC resin, the Hysol tank was labelled "polyvinyl chloride," and the Hysol-supplier's claim it contained no hazardous material "is not gospel." But he maintained there was no vinyl chloride here since "we do not buy something labelled vinyl chloride and bring it into the plant" (A. 174; 120-122, 125-126). "[M]ore for our information than anything" Widner selected for monitoring, as likely to generate the greatest VC emissions, a single operation where sheets of PVC were welded to make exhaust ducts. But since he "did not feel that we were under the standard" and the welding sample disclosed employee exposures well below 50 ppm, he "took no [further] action" to monitor the coil-dipping or any other PVC-using operation (A. 174, 157; 100-101, 103).

On May 31, 1974---more than a month after the ETS required monitoring for all potential VC-emitting operations---OSHA industrial hygienist Stewart routinely inspected Building 50 of Western's plant, noticed the Hysol tank labelled "polyvinyl chloride," and discovered upon inquiry that the company had never monitored the coil-dipping operation to determine actual employee exposures to this

lethal gas (A. 175, 157). In addition it was not disputed that even apart from this failure Western had not complied with the ETS, since Widner's single monitoring attempt was made in "early May, 1974"---long after the April 22 date set for conclusion of initial monitoring (A. 157).

4. Administrative proceedings

As a result of this inspection the Secretary on June 17, 1974 cited Western for a non-serious violation of section 5(a)(2) of the Act for failing to monitor "the ambient air of the area" surrounding its coil-dipping operation "to determine whether it contains vinyl chloride in concentrations [exceeding] 50 ppm" (A. 3-4).^{8/} The citation directed abatement within two days, and a \$30 penalty was proposed (A. 3-5). Western timely contested this

^{8/} Section 5(a)(2), 29 U.S.C. 654(a)(2), provides that each employer affecting interstate commerce "shall comply with occupational safety and health standards promulgated under this Act." See also 29 U.S.C. 651(3), 652(5); Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032, 1037-38 (C.A. 2, 1975); Lee Way Motor Freight v. Secretary, 511 F.2d 864 (C.A. 10, 1975). 29 CFR 1910.93q(c)(1), the relevant provision of the Secretary's emergency vinyl chloride standard, is twice quoted above. Supra, pp. 2-4. 29 CFR 1910.93q(a) stated this provision applied to every area in which VC is "released" and only exempted "the handling, storage or other use of [PVC] in the form of fabricated products." In addition, 1910.93q(c)(3) provided that "...monitoring shall be accomplished by collecting samples by suitable devices worn by the employee. The samples shall be analyzed by gas chromatography or by any other method which is of equivalent sensitivity. The analytical procedure shall be sensitive to 5 ppm of vinyl chloride in air...."

(continued)

citation, 29 U.S.C. 659(c); the Secretary issued his formal complaint before the Review Commission and the employer answered, 29 CFR 2200.33; and the case was heard January 8, 1975 before a Commission administrative law judge (A. 6-14).

In its answer and throughout the hearing the company admitted it did not monitor the coil-dipping operation for vinyl chloride. But it claimed the monitoring requirement applied only to VC concentrations greater than 5 ppm, since the ETS required only a 5 ppm-sensitive monitor. Since the Secretary's area sample revealed less than 5 ppm VC, it continued, none was "released" within the standard's meaning, and in any event this operation fell within the "fabricated product" exemption (A. 176, 178-179, 155; 11-14). ^{9/}

8/ (continued)

OSHA Sections 17(b) and (k), 29 U.S.C. 666(b) and (j), pertinently define a "serious" violation as one which creates "a substantial probability that death or serious physical harm could result...unless the employer did not and could not with the exercise of reasonable diligence, know of its presence." See, e.g., Shaw Const'n. Co. v. OSHRC and Usery, 534 F.2d 1183, 1185 and n. 4 (C.A. 5, 1976). Section 17(c), 29 U.S.C. 666(c), defines a nonserious violation as one which is "not...serious" and authorizes a discretionary civil penalty of up to \$1,000 for each such violation. See, e.g., Mohawk Excavating v. OSHRC and Usery, 549 F.2d 859, 862-863 (C.A. 2, 1977).

9/ The Secretary's industrial hygienist returned to this workplace on June 3, 1974, monitored the area at a time when coil-dipping was not occurring, and obtained no sample exceeding 1.7 ppm. The company also monitored after the inspection but during a non-operational time; its analysis with equipment sensitive to .01 ppm revealed no impermissible exposure levels (A. 159, 161). None of these measurements is relevant to the violation at issue here.

The judge's decision rejecting Western's contentions and affirming the Secretary's failure-to-monitor citation issued August 14, 1975; the company sought, and former Commissioner Moran timely directed, administrative review, 29 U.S.C. 661(i); and the Commission's decision reversing its judge and vacating the citation on a theory never advanced by the company followed (A. 173, 179, 165).

5. Decisions below

On the above record the Commission judge concluded Western indisputably violated 1910.93q(c)(1), since "it did not monitor its dip tank operation, which although performed infrequently did [expose employees] to the release of vinyl chloride gas" (A. 164). He flatly rejected the company's principal argument that the standard's 5 ppm minimum-sensitivity requirement for sampling analyses relieved employers of the duty to monitor where the amounts of VC actually found happened to be less than 5 ppm, holding this provision could not be read to mean such amounts "indicate...the non-presence of vinyl chloride gas" for all purposes (A. 162). Finally, he rejected Western's contention that Hysol was exempt from the ETS as a fully "fabricated product," noting that the coil-dip operation itself "was a form of [further] fabrication" and this Court had expressly affirmed the standard's application to such fabricating (A. 163-64). He accordingly affirmed the citation and its abatement requirement, but generously found the company's "lack of monitoring was due to either oversight or a misinterpretation of the standard," and reduced the proposed penalty to \$0 (A. 164-65).

On review the Commission majority inexplicably reversed and vacated the citation, relieving Western of any duty to perform initial monitoring for potentially lethal VC exposures. The apparent basis for this result was the majority's conclusion that because Western's sole monitoring attempt---which itself had been done long after the date set by the standard, and on an operation wholly dissimilar from the coil-dip---showed only very low exposures in the billion-part range, monitoring of other operations known to use VC was a "useless act" (A.175-76). This was so, the majority continued, because even without monitoring it could be "reliably predicted from the physical circumstances that [VC levels] will be well below 50 ppm," since the Company had monitored a welding operation "thought" to generate the most VC in its plant (A.176-77). This conclusion wholly ignored the standard's clear requirement that initial monitoring of all VC-using operations physically be performed, as well as the agency's rulemaking determination such monitoring was especially needed because affected industries had no data showing which kinds and types of operations generated high VC levels. It was fundamentally inconsistent with both the majority's remarks that "hindsight" based on actual monitoring could not retrospectively validate failures to monitor, and the Commission's previous GAF and United Engineers decisions holding medical anti-asbestos examinations required regardless of actual (and negligible) levels of

exposure to that substance.^{10/} Notwithstanding record evidence indicating dip-tank VC emissions 1000 times greater than Western's "reliable" welding samples even when coil-dipping was not actually being performed, the majority concluded "Nothing in the record casts doubt on the validity of [the company's] judgment, or on the good faith in which it was made" (A. 178). It therefore vacated the citation, holding Western had no obligation even to monitor any of its other VC-generating operations.^{11/}

Commissioner Cleary strongly dissented, noting that "By its terms the standard requires monitoring...in every operation in which vinyl chloride is released" and the monitoring provision "by its very nature [is] intended to supplant 'reliable predictions'" which "[n]o matter how meticulously...performed...cannot be considered...an acceptable alternative to physically monitoring...in areas where vinyl chloride is released" (A. 181-182). Moreover, he pointed out, the Secretary (A. 182-183):

10/ United Engineers & Constructors, OSHRC No. 7355, 1975-76 CCH OSHD Para. 20,163 (1975), aff'd. without opinion sub nom. United Engineers & Constructors v. OSHRC and Usery, (C.A. 3, No. 76-1041, Nov. 18, 1976); GAF Corp., OSHRC Nos. 3203, 4008, CCH ibid, pending on review sub nom. GAF Corp. v. OSHRC and Usery, (C.A.D.C., No. 76-1028), stay denied April 8, 1976. See 29 CFR 1910.93a(j) (2)-(4), now 29 CFR 1910.1001(j) (2)-(4); Industrial Union Dep't., AFL-CIO v. Hodgson, 499 F.2d 467, 481-482, 486-487 (C.A.D.C., 1974).

11/ The majority also refused, in dictum, to consider the definition of "fabricated product" expressly provided by the Secretary's permanent VC standard as an indication of that term's meaning in the emergency standard, despite the agency's plain intent to employ the same meaning for both (A. 22). Cf. 29 CFR 1910.93q(a) (2) with 29 CFR 1910.1017 (a) (2) and (b) (6); 39 Fed. Reg. 35892-93 (Oct. 4, 1974).

plainly recognized this fact when he adopted a standard that required monitoring of work environments where any vinyl chloride gas is released. * * * The Secretary's use of the phrase "grave danger"...was never intended [to] limit the duty to physically monitor to only those situations where exposure levels well below 50 ppm cannot be "reliably predicted from the circumstances." * * * Nevertheless, the majority has ignored the Secretary's approach to this grave problem and has, in effect, substituted its own monitoring standard. * * * The lead opinion suggests that the Secretary's [interpretation] require[s] formal monitoring that might later prove to be a "useless act". [But] monitoring that discloses...insignificant exposure levels cannot properly be considered a "useless act" if it supplants a "reliable prediction" that if in error might lead to a useless death....

He accordingly concluded the judge should be affirmed, since the "only reasonable interpretation" of this provision was the Department's; and because "there was no dispute that some quantity of vinyl chloride was released into the work environment during [Western's] coating operation" which the company failed to monitor, a violation of 29 CFR 1910.93q(c)(1) was shown (A. 184) (emphasis in original).

The Secretary's petition to review the majority's regressive result followed.

ARGUMENT

THE COMMISSION ERRONEOUSLY LICENSED EMPLOYERS TO
DISREGARD THIS STANDARD'S MONITORING REQUIREMENT

1. As detailed supra, in April 1974 the Secretary responded to both new laboratory evidence of vinyl chloride's carcinogenicity and alarming reports of liver cancer deaths among VC workers by issuing an emergency standard which reduced permissible exposure levels ten-fold and required employers immediately to identify, through objective monitoring, all VC and PVC-using operations exposing workers to the danger being regulated. 29 CFR 1910.93q(c)(1), 39 Fed. Reg. 12343. This initial monitoring provision expressly applied to every area and operation in which VC was handled, stored, processed or released; only areas and operations involving "the handling, storage and use of [PVC] in the form of [fully] fabricated products" were exempt; and further protective steps were mandated if such initial surveys showed exposures above permissible limits. As the Secretary's preamble to this ETS noted, broad mandatory requirements for initial monitoring were essential, since the scope of potential hazards was wide and the amount of VC produced by numerous industrial processes uncertain (39 Fed. Reg. 12343):

Because exposure to VC is hazardous, and because such exposure can occur in the processes of synthesizing or polymerizing of VC or in the handling of VC polymers or copolymers which contain absorbed VC,

this standard applies to all such processes and to the handling, reacting, manufacturing, processing, releasing, repackaging, or storage of any of these materials. The monitoring requirements serve two purposes, to trigger into operation a compliance program and to check the effectiveness of the program [emphasis added] 12/

2. In May 1974 OSHA industrial hygienist Stewart inspected Western Electric's facility and discovered it periodically insulated electrical coils by dipping them in a tank of 50% PVC labelled "polyvinyl chloride." It was undisputed that Western had not monitored this process to determine the levels of VC to which operators were exposed, despite the 360-degree temperatures involved and the known fact that heat progressively accelerates release of VC gas from PVC. The Secretary thereafter cited Western for failing to meet its crucial threshold monitoring obligation under his emergency standard, and the

12/ The Secretary's permanent VC standard, which issued six months later and further reduced permissible exposure levels by a factor of fifty to 1 ppm TWA, continued this mandatory requirement that initial monitoring of all workplaces or processes using VC or PVC "be undertaken...to determine if there is any employee exposed" to hazardous amounts of atmospheric VC. An "action level" of 0.5 ppm was established to trigger further monitoring if initial surveys showed this level exceeded for any employee. See 29 CFR 1910.93g(d) [now 29 CFR 1910.1017(d)], 39 Fed. Reg. 35896 (Oct. 4, 1974). The preamble to this standard inter alia stated that like the ETS, "the final standard...requires that individual employee exposure levels be determined. This may be accomplished by personal or area monitoring....All covered employers are required to conduct [such] initial monitoring. Where monitoring...results are at or below the action level, no further monitoring is required unless the employer has reason to suspect that any employee is exposed in excess of the action level, or unless [production] changes have been made..." 39 Fed. Reg. 35893 (emphasis added).

Commission's judge routinely affirmed that citation.^{13/} Notwithstanding this undisputed evidence and Western's failure even to contend that subjective estimates of exposure levels could satisfy this objective monitoring requirement, the Commission majority vacated the citation on precisely that ground, holding no initial monitoring of VC processes was required because the company had "reliably predicted" exposures would be low. This result was not merely erroneous under the ETS, but will continue to undermine enforcement of the permanent standard if left unreversed.

3. The Court need not resort to the general axioms that this remedial statute and its implementing regulations are to be liberally applied to protect employees, e.g., Southern R. Co. v. OSHRC and Brennan, 539 F.2d 335, 338 (C.A. 4, 1976), cert. den. 97 S.Ct. 525;^{14/} that "any exemption from [their]

^{13/} The Act's preventive purposes, broad scope, and remedial operation in enforcement contexts have been frequently examined by this and other courts and need not be repeated here. E.g., Atlas Roofing v. OSHRC, ---U.S.---, 97 S.Ct. 1261 (March 23, 1977); Brennan v. OSHRC and Gerosa, 491 F.2d 1340 (C.A. 2, 1974); Brennan v. OSHRC and Gordon Co., 492 F.2d 1027 (C.A. 2, 1974); REA Express v. Brennan and OSHRC, 495 F.2d 822 (C.A. 2, 1974); Brennan v. OSHRC and Underhill Const'n. Co., 513 F.2d 1032 (C.A. 2, 1975).

^{14/} Accord: Peyton v. Rowe, 391 U.S. 54, 65 (1968); Phillips Co. v. Walling, 324 U.S. 490, 493 (1945); Clarkson Const'n. Co. v. OSHRC and Secretary, 531 F.2d 451, 458 (C.A. 10, 1976); Ryder Truck Lines v. Brennan, 497 F.2d 230 (C.A. 5, 1974); Brennan v. Southern Contractors Service and OSHRC, 492 F.2d 498 (C.A. 5, 1974). See, e.g., Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032, 1038 (C.A. 2, 1975); Brennan v. OSHRC and Gerosa, 491 F.2d 1340, 1343-45 (C.A. 2, 1974); Brennan v. OSHRC and Kesler & Sons Const'n. Co., 513 F.2d 553 (C.A. 10, 1975).

terms must be narrowly construed," ibid.; ^{15/} and that the Secretary's reasonable interpretation of his own regulation ought normally to be controlling. E.g., Clarkson Const'n. Co., supra n. 14, 531 F.2d at 457; Brennan v. Southern Contractors Service, ibid., 492 F.2d at 501. ^{16/} For there is no exemption at all from this standard's initial-monitoring requirement, and the Commission majority's gloss on this provision is so "unreasonable and inconsistent with its purpose" that even if given deference it cannot prevail. Brennan v. OSHRC and Gerosa, supra, 491 F.2d at 1344; see Brennan v. OSHRC and Underhill Const'n. Corp., supra, 513 F.2d at 1038. As shown supra, pp. 1-7, the Secretary deliberately included under the ETS all employers with operations that might generate VC emissions, including the generally low-level fabricating industry. While he recognized that at levels below 50 ppm there was no "emergency" (as then defined) warranting abatement, he also imposed an initial unqualified obligation on all PVC-using employers to monitor each such operation "to [objectively] determine whether" and in what

^{15/} Cases supra, nn. 13-14. This is true even where the protection required is being enforced against the employees' own wishes. See, e.g., I.T.O. Corp. et al. v. OSHRC and Usery, 540 F.2d 543 (C.A. 1, 1976); Atlantic & Gulf Stevedores v. OSHRC, 534 F.2d 541, 552-556 (C.A. 3, 1976).

^{16/} See Usery v. Godfrey Brake & Supply Service, 545 F.2d 52, 55 (C.A. 8, 1976); Langer Roofing & Sheet Metal v. Secretary and OSHRC, 524 F.2d 1337, 1339 (C.A. 7, 1975); Madden Const'n. v. Hodgson, 502 F.2d 278 (C.A. 9, 1974).

amounts these potentially-hazardous processes in fact emitted VC.29 CFR 1910.93q(c), supra. The plain purpose of this requirement was not only "to trigger into operation a compliance program [if necessary] and to check the effectiveness of the program," but to promote prompt future compliance by insuring employer awareness of actual exposure levels if---as seemed probable, and swiftly ensued---the 50 ppm level was further reduced. 39 Fed. Reg. 12342-43; id., at 35890 et seq. ("it was expressly recognized that this 50 ppm ceiling was a tentative interim standard"). This rulemaking choice not only accorded with OSHA's general mandate to assure healthful working conditions "so far as possible", 29 U.S.C. 651; it was plainly necessary where, as here, the regulated substance was an admitted cancer hazard whose parameters were ill-defined.

The instant citation for Western's failure to meet this initial-monitoring obligation was accordingly required, since the company's unexamined dip-tank process was precisely the type of operation at which this requirement was aimed. The Commission majority's conclusion no monitoring was mandated because Western's subjective prediction of low levels made physical monitoring a "useless act" is unsupportable and must be set aside. E.g., Brennan v. OSHRC and Gerosa, supra, 491 F.2d at 1344.

4. The majority's conclusion must independently be set aside because its rationale was expressly rejected by this

Court on pre-enforcement review of pertinently identical monitoring provisions in the Secretary's permanent VC standard. 29 U.S.C. 655(f); SPI, supra. Unanimously rejecting contentions that continuing to include fabricators under the permanent standard was irrational because record evidence indicated their exposure levels were generally very low vis-a-vis raw producers and polymerizers, the Court first noted that fabricators work with resins containing VC and that liver cancer deaths had been reported among fabricating employees. It then held (509 F.2d at 1309-1310):

If, in the future, the monitoring under the standard indicates that the VCM level among fabricators is sufficiently low and that the sporadic, unpredictable exposure of these workers to VCM has been controlled, [then] the fabricators might well be excluded or included in a separate, less rigorous standard. ...But this would be for the Secretary to decide ...and, as the record presently stands, their inclusion [for monitoring purposes] is amply justified [emphasis supplied].

This reasoning applies a fortiori where the claim of low levels was not even based on objective monitoring. It foreclosed the Commission majority's contrary interpretation here.^{17/}

^{17/} We have already indicated, supra pp. 18-19, that the Court need not reach the general issue of whether deference to the Secretary or to the Commission is appropriate, since deference only weighs competing reasonable interpretations and the Commission's interpretation was not reasonable. Cases supra, nn. 14, 16 . The case does, however, present one peculiarity which warrants a more limited declaration. Where, as here, the Secretary's citation falls squarely within his standard's express purposes and those purposes have been judicially affirmed on pre-enforcement review, the interpretation which underlies such citations appears specially entitled to deference.

(footnote ^{17/} continued next page)

(footnote 17/ continued)

An opposite result would place this Court in the anomalous position of having declared the Secretary's monitoring requirement proper on pre-enforcement review, but deferring to the Commission's inconsistent interpretation on enforcement review. Indeed, it would effectively afford the Commission power to "rewrite" health and safety regulations---a result which the Commission repeatedly has recognized it cannot effect. E.g., Turner Co., Div. of Olin Corp., OSHRC No. 3635, 1976-77 CCH OSHD Para 21,023 at pp. 25,274-75 (Aug. 24, 1976), review pending, C.A. 7, No. 76-2025. Particularly because the concept of deference is centrally based on expertise in implementing effective enforcement, e.g., Udall v. Tallman, 380 U.S. 1, 16-17 (1965), and the Commission---which simply sits as an administrative court to resolve contested citations swiftly and fairly, 29 U.S.C. 651(3); Leg. Hist. 392-393, 462-464, 466 (Sen. Javits)---possesses relatively little relevant expertise versus a Secretary charged with weighing enforcement implications in rulemaking and implementing his decisions on a far broader scale than the small percentage of citations actually contested, see, e.g., AFL-CIO v. Brennan, 530 F.2d 109, 120-123 (C.A. 3, 1975), neither precedent nor sound administration justify a contrary result. Cf. cases supra, nn. 13-16.

For these reasons the Court should hold that where the Secretary's interpretation has been affirmed on pre-enforcement review, it is binding on the Commission. At the very least the Court should declare what it has tacitly held---that where the Secretary and Commission disagree, the interpretation which best promotes the Act's aims controls. Brennan v. OSHRC and Gerosa, supra, 491 F.2d at 1343-44. That, it seems to us, is the only rule which assures that regressive interpretations will not heedlessly be deferred to by reviewing courts. Cf., e.g., Brennan v. OSHRC and Fiegen, 513 F.2d 713 (C.A. 8, 1975); Dunlop v. Ashworth, 538 F.2d 562 (C.A. 4, 1976).

5. We additionally note that permitting employers to avoid objective monitoring requirements if they can "reliably predict" low (ie., safe) VC emissions is inconsistent with settled OSHA principles. That is true not only because the Act expressly provides a formal route for resolving such relative-safety issues, e.g., 29 U.S.C. 655(d); Atlantic & Gulf Stevedores v. OSHRC, supra n.15 , 534 F.2d at 555-556, but because such standards "unambiguously foreclose" private employer determinations that compliance is unnecessary because their customary mode of operating is "safe." Messina Const'n. Corp. v. OSHRC and Secretary, 505 F.2d 701, 702 (C.A. 1, 1974); Intercounty Const'n. Co. v. OSHRC, 522 F.2d 777 (C.A. 4, 1975), cert. den. 423 U.S. 1032. See, e.g., Brennan v. OSHRC and Underhill Const'n., supra; Brennan v. OSHRC and Gerosa, supra. That foreclosure applies irrespective of the reliability of any subjective company prediction, since "The standard presupposes...the hazard" and instances of excess exposures "need not actually have occurred" before the employer's monitoring obligation attaches. Ibid, see REA Express v. OSHRC and Brennan, supra n.13 , 495 F.2d at 825; Lee Way Motor Freight v. Secretary, 511 F.2d 864, 869 (C.A. 10, 1975). Particularly because initial "monitoring provisions are especially important because the results of that process often determine when and what protective measures are taken," and even "satisfactory results in the initial monitoring would not...justify a conclusion that [excess] concentrations could not be foreseen" absent "considerable [objective] information regarding...workplace

[exposure levels]," Industrial Union Dep't., AFL-CIO v. Hodgson, 499 F.2d 467, 481-482 (C.A.D.C., 1974), Western's private determination to forego monitoring cannot self-exempt it here.

Indeed, the Commission has repeatedly recognized that it does not have power to alter a standard's plain requirements in the manner effected below. In Turner Co., supra n. 17, it emphatically rejected employer contentions that use of ear plugs satisfied a noise standard permitting such plugs only after feasible engineering controls had been implemented, stating that

...adoption of [this] argument would...effectively rewrite the standard and reverse the order of priority of prescribed abatement techniques. This Commission has refused to construe...standards as containing...superfluous provisions when such a construction is at all avoidable.* * *The construction urged by respondent finds no support in the words of the standard. The standard itself is clear and unambiguous. It requires that engineering...controls first be used to reduce noise levels...Personal protective equipment must then be used to supplement the...controls if the use of such controls do[es] not reduce noise...to the prescribed limits....This construction comports with the statutory purpose of assuring "so far as possible every working man...in the Nation safe and healthful working conditions..."...a construction which we are bound to place on occupational safety and health standards. * * *The text of 1910.95 is plainly controlling.

1976-77 CCH OSHD at p.25,274 (emphasis added). And in GAF/United Engineers, supra, n.10, it rejected contentions that the asbestos standard's medical-examination requirement was limited to exposures in excess of permissible limits rather than applying to all exposures, noting that:

The "hazard" is the exposure to harmful materials and the purpose of a medical examination is to ascertain any adverse effects from this exposure. There is no limitation restricting this to exposure at the level of the standard, and we imply none.

* * * * *

On whether a "hazard" exists warranting medical examinations in situations where employees are engaged in occupations exposed to any airborne concentrations of asbestos fibers, we note that there is substantial uncertainty among scientific authorities as to exactly what levels of prolonged exposure are detrimental to human life.

* * * * *

This uncertainty lends force to the conclusion that the Secretary promulgated [this provision] without reference to any threshold level so as "to most effectively determine whether the health of such employees is adversely affected by such exposure. ...29 U.S.C. 655(b)(7).

1975-76 CCH OSHD at pp. 23,981-82 (emphasis added). Contrary to the Commission majority's apparent belief (A. 178), there is no discernible difference between GAF/UE and this case, since both concern application of requirements with "no limitations," and in both "substantial uncertainty" existed as to exposure from which adverse health effects might result. The controlling principle in both cases is that actual exposure levels are irrelevant to the threshold employer duties imposed by such prophylactic provisions.

6. We finally note that even as a matter of record fact the Commission majority's conclusion Western acted reasonably is unsupported. The majority concluded the company could "reliably predict" there were no operations approaching the ETS's 50 ppm emission limit based on sampling results from one operation likely ---in the company's opinion---to generate the greatest VC levels. But the Secretary's coil-dip monitoring revealed levels 1000 times higher even though no coil-dipping was then taking place---levels which presumably would increase once heat was applied. Supra,

pp. 3, 6, 8, 14 and n.9. That evidence alone refutes the majority's statements (A. 176,178) that "Nothing in the record casts doubt on the validity of [the company's] judgment" and that monitoring in this situation would be a "useless act." Especially in light of company hygienist Widner's firm and completely untested belief that compliance was within his sole discretion whether or not physical monitoring had been performed, exactly the opposite is the case.^{18/}

7. In sum, the Commission majority's application of the ETS initial monitoring provision was legally and factually erroneous, as well as inconsistent with court and Commission interpretations of indistinguishable provisions. Importing a "reasonable prediction" exemption into initial monitoring designed to insure precise knowledge of the cancer risks to workers undermines not only the ETS, but the parallel provision of both the permanent VC standard and other health standards requiring similar threshold risk investigations by employers. Cf., e.g., 29 CFR 1910.1028(e)(1), 42 Fed. Reg. 22516, 22522, 22526 (May 3, 1977) (ETS for exposure to leukemia-causing benzene). It ill serves a statute expressly passed to assure healthful working conditions "so far as possible," by interposing a rule that employers need only do what they think reasonable, despite a standard's rational command that they do more.

^{18/} Western may contend that the Commission result was correct in any event since (1) the standard could not require monitoring of levels below 5 ppm because only 5 ppm-sensitive equipment was required, and (2) this operation was exempt. With respect to (1) the short answer is that there is no way to objectively determine whether levels are below 5 ppm except to test. With respect to (continued)

(18/ continued)

(2) we think the Commission dicta is erroneous. The permanent standard's definition of "fabricated product" is plainly relevant to the ETS' use of that term, and this coil-dipping operation was clearly not use of a "fabricated product," since the Hysol was subjected to temperatures designed to induce "mass melting" which results in VC emissions. If there was any ambiguity, the company should nevertheless have monitored the operation, since exemptions from remedial requirements are narrowly construed. Southern R. Co. v. OSHRC and Brennan, supra.

CONCLUSION

For the foregoing reasons the Commission majority's decision should be set aside and the judge's decision reinstated as the Commission's final order.

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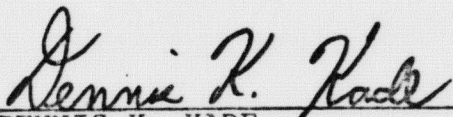
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